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6 Attorneys for Defendants
Apex Stores, LLC; Apex, LLC; Apex At Home, LLC
7

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 OAKLAND DIVISION
11

12 24 Hour Fitness USA, Inc.,

13 Plaintiff,

14 v.

15 Apex Stores, LLC; Apex, LLC; Apex At
Home, LLC

16 Defendants.
17

Case No. 4:08-cv-01681-SBA

DECLARATION OF ANDREW A. GATES

18 I, Andrew A. Gates, hereby under oath depose and state as follows:

19 1. The matters set forth in this declaration are based upon my personal knowledge. I
20 am a resident of the Commonwealth of Massachusetts. I make this declaration in support of the
21 Defendants' Motion to Dismiss the above-captioned lawsuit.

22 2. Apex Stores, LLC ("Apex Stores") is a Rhode Island limited liability company
23 founded on June 25, 1999, with a sole place of business at 100 Main Street, Pawtucket, Rhode
24 Island.

25 3. I am the sole owner and Manager, President and sole officer of Apex Stores.

26 4. Apex Stores owned and operated apexstores.com and apexexpress.com from
27 June 25, 1999 until June 30, 2001, but those operations were transferred to Apex At Home, LLC
28 ("Apex At Home"), a separate entity, on June 30, 2001.

1 5. From June 30, 2001 through the beginning of May 2008, Apex Stores' primary
2 purpose has been to maintain ownership of certain trademarks and domain names. After June 30,
3 2001, Apex Stores did not directly use its trademarks or domain names to provide retail or other
4 services, or to manufacture or sell any products. Instead, Apex Stores licensed its trademarks and
5 domain names to other, separate operating entities that provided retail and other services.

6 6. On April 30, 2008, Apex Stores transferred all of its trademarks, including all
7 trademarks using the term "Apex", to Apex, LLC ("Apex, LLC"), with the exception of two
8 Rhode Island state trademark registrations that were transferred on May 6, 2008 and one
9 Massachusetts state trademark registration that was transferred on June 2, 2008.

10 7. Apex Stores has not conducted business in the State of California for at least seven
11 years. Its only tangential contact with California is that, in April 2007, Apex Stores, along with
12 an affiliated company, entered into a Web Site Management Agreement with a Delaware
13 corporation with an office in California. That contract was entered in Rhode Island, is governed
14 by Rhode Island law, and gives exclusive jurisdiction to the state and federal courts of Rhode
15 Island to resolve any dispute, so Apex Stores does not believe it was conducting business in
16 California by being a party to that contract. In any event, the domain names that are the subject
17 of the Web Site Management Agreement do not include any domain name using an "Apex" mark.

18 8. Apex Stores is not registered to do business in California.

19 9. Apex Stores does not maintain an office in California nor does it own property in
20 California.

21 10. Apex Stores has no employees in California.

22 11. Apex Stores does not have an agent for service of process, nor any other registered
23 agent, in California.

24 12. Apex Stores does not sell any products or services, and does not solicit sales of
25 products or services, in California.

26 13. Apex Stores does not purchase, sell or endorse any print, television, or radio
27 advertisements in California.

28 14. Apex, LLC is a Rhode Island limited liability company founded on March 30,

1 2004, with a sole place of business at 100 Main Street, Pawtucket, Rhode Island.

2 15. Apex, LLC is owned by Zelby Holdings, Inc., a Rhode Island Corporation.

3 16. I am the Manager, President and sole officer of Apex, LLC.

4 17. Apex, LLC was formed in 2004 for the sole purpose of owning various trademarks
5 including all of the "Apex" trademarks. It owns the common law and registered "Apex" marks
6 that are at issue in this lawsuit and the lawsuit filed by Apex, LLC and Apex At Home, LLC
7 against 24 Hour Fitness USA, Inc. in the District of Rhode Island.

8 18. Apex, LLC has no contacts in the State of California.

9 19. Apex, LLC is not registered to do business in California.

10 20. Apex, LLC does not maintain an office in California nor does it own property in
11 California.

12 21. Apex, LLC has no employees in California.

13 22. Apex, LLC does not have an agent for service of process, nor any other registered
14 agent, in California.

15 23. Apex, LLC does not sell any products or services, and does not solicit sales of
16 products or services, in California.

17 24. Apex, LLC does not purchase, sell or endorse any print, television, or radio
18 advertisements in California.

19 25. Apex At Home, LLC ("Apex At Home") is a Rhode Island limited liability
20 company that was founded on June 12, 2001, with a principal place of business at 100 Main
21 Street, Pawtucket, RI 02860.

22 26. I am the sole owner of Apex At Home.

23 27. Michael Dvorin is the President of Apex At Home, and he manages the day-to-day
24 operations of that company, which since July 1, 2001, has included internet retail services through
25 the web site found at the domain names "apexstores.com" and "apexexpress.com."

26 28. Apex Stores, Apex, LLC, and Apex At Home are separate entities operating
27 independently of each other. I manage all business conducted by Apex Stores and Apex, LLC. I
28 am not involved in the day-to-day management of the operations of Apex At Home.

29. Apex Stores, Apex, LLC, and Apex At Home maintain separate books and records, maintain separate bank accounts, operate under separate budgets, and do not share assets or liabilities.

30. Apex At Home, its predecessors and affiliates, since at least as early as 1942, have consistently provided and continue to provide retail services. Over the years, Apex At Home, its predecessors and affiliates, have expanded these services to include without limitation, the operation of retail department stores, specialty concept stores, mail order operations and online retail operations.

31. Since at least as early as the 1960s, the retail services provided by Apex At Home, its predecessors and affiliates, have included a wide variety of general merchandise and services, including without limitation sporting goods, athletic apparel, athletic footwear, athletic equipment, fitness equipment, various food items and products, health and beauty products, related fitness accessories and a wide variety of other related and unrelated items.

32. Apex, LLC and Apex At Home are the owners of a family of common law and registered Apex trademarks, which have been in continuous use since 1942 ("Apex") and 1996 ("Apex Online" and "Apex Stores") in connection with various retail store, mail order purchase and computerized online retail services.

Signed and sworn to under the pains and penalties of perjury this 30th day of June, 2008.

/s/ Andrew A. Gates

Andrew A. Gates

Attorney Attestation

As the attorney e-filing this document, and pursuant to General Order No. 45, I hereby attest that Andrew A. Gates has concurred in this filing.

Dated: June 30, 2008

/s/ Nathaniel Bruno

Nathaniel Bruno